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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BENIGNO VELASQUEZ ARCEO et al.,

Defendants and Appellants.

2d Crim. No. B213721
(Super. Ct. Nos. KA078086 & KA076068)
(Santa Barbara County)

Benigno Velasquez Arceo and Rick Mendoza appeal from judgment after conviction by jury of crimes they committed together against a single victim. Arceo was convicted of attempted willful, deliberate and premeditated murder (Pen. Code, § 664, subd. (a)/187, subd. (a))¹ and shooting at an occupied building (§ 246). Mendoza was convicted of attempted murder (§ 664/187, subd. (a)), and shooting at an occupied building (§ 246). The jury was unable to reach a verdict on the premeditation allegation as to Mendoza.

The jury found true allegations that both appellants committed their crimes for the benefit of, and with intent to promote, a street gang within the meaning of section 186.22, subd. (b)(1)(C), and that in each crime a principal personally used a firearm (§ 12022.53, subd. (b) & (e)(1)), personally and

¹ All statutory references are to the Penal Code unless otherwise stated.

intentionally discharged a firearm (*id.* subds. (c) & (e)(1)) and caused great bodily injury (*id.* subds. (d) & (e)(1) & § 186.22, subd. (b)). The court found true an allegation that Mendoza suffered a prior conviction for a serious or violent felony for which he served a prison term (§§ 1170.12, subds. (a)-(d), 667, subd. (a)(1) & 667.5, subd. (b)). In an unrelated case (Los Angeles Super. Ct. No. KA0706068), the court found that Arceo was in violation of probation after being convicted of possessing marijuana for sale (Health & Saf. Code, § 11359).

The court sentenced Arceo to consecutive terms of life in prison for the attempted premeditated murder (§§ 187/664, subd. (a)) and 25 years to life for the firearm enhancement (§ 12022.53, subds. (d) & (e)(1), 186.22) and a concurrent term of 5 years for shooting at an occupied building.² For the unrelated marijuana conviction, the court imposed a term of eight months (one-third the midterm) and ran it consecutive to the indeterminate term for attempted murder.

The court sentenced Mendoza to 14 years to life for attempted murder (§ 1170.12, subd. (c)(1)), plus consecutive terms of 25 years to life for the firearm enhancement (§ 12022.53, subds. (d) & (e)(1), 186.22), 5 years for the prior serious felony (§ 667, subd. (a)(1)), and 1 year for the prior prison term (§ 667.5, subd. (b)). The court imposed a concurrent term of five years for shooting at an occupied building. The court did not grant either appellant presentence conduct credit.

Appellants contend (1) that the trial court erred when it refused to disclose juror contact information, (2) when it denied a motion for new trial based on juror misconduct, (3) that Arceo's conviction for premeditated attempted murder was inconsistent with the jury's inability to reach agreement on premeditation as to Mendoza, (4) there was not substantial evidence that Arceo intended to kill the victim, (5) that the finding that the shooting was committed for the benefit of a

² The court also imposed and stayed, pursuant to section 654, additional terms of 20 and 10 years for the remaining firearm enhancements (§ 12022.53, subds. (b) & (c)) and 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)).

street gang was not supported by substantial evidence that Puente is a street gang, (6) that the findings that Mendoza acted as an aider and abettor and that the shooting was a natural and probable consequence of the target offense were not supported by substantial evidence, (7) that the court erred when it imposed a consecutive term for Arceo's unrelated marijuana conviction and (8) that the court should have given both appellants 15 percent presentence conduct credits.

We conclude that sentencing error occurred and otherwise reject appellants' contentions. We reverse in part, remand for resentencing, and otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

On an evening in October 2006, Appellants' victim, Aliro Ramirez, drove to a Radio Shack store. He left his children in his van and crossed the parking lot toward the store. Arceo's car was parked near the front of the store. Arceo stood by the driver's door, Mendoza was in the passenger seat, and a third person was in the rear seat. As Ramirez passed Arceo, they made eye contact. Arceo said, "What the fuck are you looking at?" Ramirez said, "I'm not looking at nothing." Arceo hit Ramirez in the jaw. Ramirez stumbled. Mendoza came out of the car and hit Ramirez in the nose. Ramirez said, "Hey, I don't want no trouble. I got my kids inside the van. . . . I'm from nowhere [¶] . . . I'm not gang related Just leave me alone It's cool." Store clerks saw the exchange.

Ramirez was afraid, so he went into the store. Mendoza stood in the open doorway and taunted Ramirez to come back outside. A store clerk saw Arceo walk back to the car.

Mendoza stood in the doorway and called Ramirez names. He told Ramirez to "step out," and to "be a man." Mendoza took off his shirt, showing his tattoos, and said he was "from La Puente." He said "La Puente Locos." Ramirez asked the store clerks to call the police. They did not immediately respond.

A clerk testified that he asked both Mendoza and Ramirez to leave and that Mendoza tried to shake Ramirez' hand, shook the clerk's hand, and said he

did not want any trouble. According to the clerk, Ramirez then said that Mendoza was afraid to fight him "one-on-one," whereupon Mendoza took offense and challenged Ramirez to a one-on-one fight outside, around the building. Ramirez repeated that he did not want any trouble.

The whole front of the store was glass. It was dark outside.³ Ramirez reached for his own phone to call the police. Shots were fired into the store, breaking glass and hitting Ramirez through the upper leg, near his groin. The bullet hit an artery. Ramirez saw Mendoza standing in the doorway, without a gun, as the first shot was fired. A clerk saw muzzle flash coming from a car that had pulled alongside the storefront. He believed it was the same car that Arceo had walked toward. Mendoza left while the shots were being fired. Arceo and Mendoza were arrested nearby in Arceo's car.

A gang expert testified that Arceo and Mendoza are members of the Puente street gang. He gave the opinion that they committed the crimes on behalf of Puente. He said Puente's members engage in attempted murders, shootings and other crimes and described two crimes committed by other Puente members.

At trial, the prosecution's theory was that Arceo was the shooter, Mendoza was liable as an aider and abettor of the target crime of battery for the benefit of a street gang, and attempted murder and shooting at an occupied building were the natural and probable consequences of the target crime.

During deliberations, the jury asked whether it was "logical, rational, and within reason to believe" that one defendant committed attempted murder that was premeditated while the other committed attempted murder that was not premeditated. The court responded that it could not comment on what is logical, rational or within reason to believe, but instructed them to separately consider the evidence as it applied to each defendant, decide each charge for each defendant

³ Two witnesses said it was dark. Ramirez said, "It wasn't dark until they took me out of there." It was 7:30 at night in October.

separately, and report to the court if they could not reach a verdict on any charge as to any defendant. The jury reported that it was unable to reach a verdict on the allegation that Mendoza committed the attempted murder with premeditation, and the court declared a mistrial as to that allegation.

The jury returned unanimous verdicts against both defendants on all other charges and allegations. The court denied a post trial motion by Arceo to reduce his conviction for premeditated attempted murder on the theory that the premeditation finding against him was inconsistent with the jury's inability to find premeditation against Mendoza, and was not supported by sufficient evidence of premeditation.

The court also denied Arceo's motion for disclosure of juror contact information and for new trial based on juror misconduct. On the first day of trial, the court had admonished Arceo's sister (Carolina Flanagan) for having juror contact and ordered her, and several other family members and supporters, including Arceo's mother, Linda Velasquez and a supporter named Brenda Acuna, to wait at the end of the hallway before each session until they were called in by the bailiff. The court warned them that if they did not follow the order they could be jailed or fined for contempt.

In support of his post-trial motions, Arceo submitted (through new counsel) declarations of Velasquez and Acuna who swore they had heard jurors discussing the case in the hallway during trial. Velasquez declared that in the hallway sometime during trial she heard a male juror say to a male alternate juror, "I believe he's 'Guilty,'" and heard the alternate respond, "good, good, you should. It doesn't matter what the facts are." She said the male juror looked at her and said, "I feel bad doing this." She said she also heard jurors talk in the hallway about witnesses and heard one say, "poor guy that got shot." Acuna, a friend of Arceo's cousin who had attended the trial every day, declared that a male alternate juror said to two other jurors that "gang members regardless of the evidence were guilty," and the jurors shook their heads in the affirmative.

Mendoza joined Arceo's motions.⁴ The court conducted an evidentiary hearing to test the credibility of the declarations. There were inconsistencies in the testimony of Velasquez and Acuna regarding the timing of the statements and their own interactions with the jurors. Both women said they were afraid to report the jurors to the court because the court had admonished them to stay away from jurors in the hallway. Both claimed to have reported the juror conduct to Arceo's trial counsel.

The court called Arceo's trial counsel as a witness. He contradicted their testimony. He testified that he did not know who Acuna was. He had one report from Velasquez during trial that she heard jurors whispering, but when he asked what she heard specifically she only said, "gangs." He admonished Velasquez to stay away from the jurors. He did not feel he should report the whispering because it was a gang case with gang allegations and expert testimony, and he felt that drawing attention to it could cause juror backlash. Velasquez reported no other incident and did not say that she heard anyone say, "guilty." No one reported anything else to him.

The court concluded that the declarations and testimony of Velasquez and Acuna were "fabricated from whole cloth" and that the alleged conduct did not occur. The court denied the motion for new trial and the motion for disclosure of juror information.

DISCUSSION

Denial of Request for Disclosure of Juror Contact Information

Appellants contend that the trial court was required to disclose juror contact information, absent express juror objection, because the declarations in support of the request established good cause to believe that jurors discussed the

⁴ Mendoza also filed a motion for new trial based on a new alibi witness. The motion was denied after the court found the witness was not credible and it is not part of this appeal.

case prior to deliberations and were biased against gang members. We disagree. The trial court tested the credibility of the declarations in a hearing that was authorized by its inherent power to safeguard juror privacy and did not abuse its discretion when it determined there was no good cause for disclosure because the alleged conduct did not occur.

We review denial of a motion for disclosure under Code of Civil Procedure section 237 for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 604.) Sections 206 and 237 of the Code of Civil Procedure provide the procedures for sealing and disclosure of juror information. These statutes are designed to "protect jurors from posttrial harassment" by "restrict[ing] the defendant from receiving juror personal information unless necessary." (*People v. Granish* (1996) 41 Cal.App.4th 1117, 1128-1129.) Nothing in the statutes abrogates the trial court's traditional, inherent power to safeguard juror safety and privacy. (*People v. Townsel* (1999) 20 Cal.4th 1084, 1095.)

Code of Civil Procedure section 237 provides that, upon the recording of the verdict, juror identifying information is automatically sealed. A person may thereafter obtain it only by petition supported by good cause. If the petition and supporting declaration establish a prima facie showing of good cause, the court "shall set the matter for hearing" (*id.* subd. (b)), with notice to jurors and an opportunity to protest, unless "there is a showing on the record of facts that establish a compelling interest against disclosure" (*ibid.*), such as "protecting jurors from threats or danger of physical harm" (*ibid.*).⁵

⁵ Code of Civil Procedure section 237 provides that if a hearing is set, the court must provide notice to each affected juror, who may appear to object (*id.* subd. (c)), and after the hearing, the court must disclose the information to defendant's counsel "unless a former juror's protest is . . . sustained" (*id.* subd. (d)). The court shall sustain a protest "if, in the discretion of the court, the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure . . . or the juror is unwilling to be contacted by the petitioner" (*id.* subd. (d.)).

Here, the court tested the declarations in an evidentiary hearing and then denied the motion based upon its determination that the events set forth in the declarations did not occur. It said "[t]here's no prima facie case because it's simply not believable, not credible testimony." While the statute does not expressly provide for an interim hearing to assess the declarants' credibility, the procedure was consistent in these circumstances with the exercise of the court's inherent power to safeguard juror safety and privacy. (*Townsel v. Superior Court, supra*, 20 Cal.4th at p. 1087; *People v. Granish, supra*, 41 Cal.App.4th at p. 1126.)

The court was concerned about juror safety, "in the context of this case, gang shooting." There had already been improper contact between the defendants' supporters and jurors, for which the supporters had been admonished. The court pointed to the "overriding gang evidence in this case." It said, as "an example, the record . . . doesn't always show the picture. . . . Mr. Arceo came into court today with a new tattoo that says, '[f]uck you' on his left cheek facing the court and that wasn't here the last time the defendants were present in court. But I think it's an important record to make because I do not under these circumstances believe that we move immediately into notifying jurors, having jurors come to court based on a raw affidavit"

"Juror identifying information may be ordered confidential to protect jurors from . . . intimidation, harassment, hostility or threats exemplified by the conduct of [a] defendant's family." (*People v. Granish, supra*, 41 Cal.App.4th at p. 1131.) In *People v. Granish*, the declarations of five supporters, stating that they saw a juror discuss the case with her husband, did not establish good cause for disclosure of the remaining jurors' contact information, in view of the subject juror's denial and the fact that "[t]he accusations of misconduct were raised solely by the defendant's friends and relatives (not unbiased sources) who had themselves to be admonished early in the proceedings to refrain from improper contact with jurors." (*Ibid.*)

We defer to the credibility determinations of the trial court. Because no good cause was shown, the court was not required to conduct a hearing on juror objections to disclosure. (*People v. Jefflo* (1998) 63 Cal.App.4th 1314.)

*Denial of Motion for New Trial Based on
Juror Misconduct and Concealed Bias*

We also reject appellants' contention that the court erred when it denied Arceo's motion for new trial based on juror misconduct. In denying the motion, the trial court stated that it "simply [did] not believe there was any jury misconduct in this particular case because [it did not] believe the witnesses." We independently review the trial court's denial of a motion for new trial based on juror misconduct, but we accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*People v. Gamache* (2010) 48 Cal.4th 347; [2010 WL 962867.]

Discussion of a case prior to deliberations and concealment of relevant facts during voir dire constitute juror misconduct. (*In re Hitchings* (1993) 6 Cal.4th 97, 111, 118.) But here the trial court found that the neither occurred. It determined that the testimony in support of the new trial motion was fabricated. Substantial evidence supported that credibility determination. The witnesses were friends, family and supporters of Arceo. Their testimony was inconsistent in many details and was contradicted in important respects. The court did not err when it denied Arceo's motion for new trial.

Arceo's Conviction for Premeditated Attempted Murder

Appellants contend that Arceo's conviction for premeditated attempted murder was inconsistent with the jury's inability to reach agreement on premeditation as to Mendoza. The verdict on premeditation, even if inconsistent, may stand. (*People v. Chun* (2009) 45 Cal.4th 1172, 1204.)

It is settled that an inconsistent verdict is allowed to stand (*People v. Abilez* (2007) 41 Cal.4th 472) and "acquittal of one codefendant normally will not require acquittal of another" (*People v. Howard* (1988) 44 Cal.3d 375, 412), even in

a joint prosecution for conspiracy in which all but one coconspirator is acquitted (*People v. Palmer* (2001) 24 Cal.4th 856, 865). This is because juries have an unreviewable power to acquit for impermissible reasons (*id.* at p. 863). Therefore, "[a]n inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict. [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) Review of the sufficiency of the evidence affords sufficient protection to the codefendant who is not acquitted. (*People v. Palmer, supra*, at p. 863.)

Sufficiency of Evidence of Intent to Kill

Appellants' contend that there was insufficient evidence to support a finding that Arceo intended to kill Ramirez because there was no evidence he could see Ramirez inside the store. We disagree.

We consider the record in the light most favorable to the judgment, drawing all inferences which support the jury's verdict, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We must ensure the evidence is reasonable in nature, credible and of solid value, but must defer to the trier of fact on its evaluation of witness credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The crime of attempted murder requires proof of intent to kill the identified victim. (*People v. Bland* (2002) 28 Cal.4th 313, 327-329; *People v. Guerra* (1985) 40 Cal.3d 377, 386.)

There is sufficient evidence in the record to support a finding that Arceo intended to kill Ramirez. The jury could infer Arceo's intent to kill from the testimony of Ramirez about the conflict in the parking lot and the build-up to the shooting. While it was dark outside, the jury could infer that the store was lit from the fact that it was open for business. The storefront was entirely glass and Ramirez was shot near the groin area, supporting an inference that Arceo aimed at Ramirez with intent to kill him.

*Finding that Shooting Was Committed for
the Benefit of a Criminal Street Gang*

Appellants challenge the sufficiency of evidence that Puente is a street gang for purposes of section 186.22. The evidence was sufficient to support the jury's finding.

To establish that a group is a criminal street gang within the meaning of section 186.22, the prosecution must prove that (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more specified crimes; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. (*Id.* subd. (f); *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) Appellants contend that there was insufficient evidence that any section 186.22 offense was the primary activity of the group named Puente. They point out that the gang expert did not use the words "primary" or "chief" to describe Puente's criminal activities and the jury heard only about two specific crimes committed by other members of Puente in 2006.

Primary activities means "' . . . one of the group's 'chief' or 'principal' occupations. . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Proof of occasional commission of the enumerated crimes by the group's members is not sufficient. (*Ibid.*) Here, there was proof of more than occasional commission of crimes by Puente members. The prosecution's expert testified that, in the years he had investigated the activities of Puente members, he observed that the "kinds of criminal activities" that Puente members "involve themselves in" include numerous homicides, attempted murders, drive-bys, shootings, shootings at inhabited dwellings, robberies, kidnappings, rapes, distribution of narcotics, possession, and distribution of weapons. "[E]vidence that the group's members consistently and repeatedly have committed" one or more of the enumerated crimes is sufficient. (*Id.* at p. 324.)

*Finding that Mendoza Aided and Abetted Arceo's
Crimes and that Attempted Murder Was a Natural
and Probable Consequence of the Target Offense*

Appellants contend that the finding that Mendoza acted as an aider and abettor and that the shooting was a natural and probable consequence of the target offense were not supported by substantial evidence. We disagree.

We view the evidence in the light most favorable to the prosecution, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Holt* (1997) 15 Cal.4th 619, 667.)

Aider and abettor liability requires proof that the defendant, with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, facilitating or encouraging commission of the crime, by act or advice, aids, promotes, encourages or instigates commission of the crime. (*People v. Hill* (1998) 17 Cal.4th 800, 851.) Mendoza does not challenge his liability for aiding and abetting the target crime of battery, but challenges consequential liability for the attempted murder.

A person who aids and abets a crime is guilty not only of that target crime, but also of any other crime the perpetrator commits that is a natural and probable consequence of the intended crime. (*People v. Medina* (2009) 46 Cal.4th 913, 920.) Thus, one who participates in a gang-related fist fight is liable, when the violence escalates, for a reasonably foreseeable shooting, even if he did not know that his companion was armed. (*Ibid.*) It is not necessary that the aider and abettor actually foresaw the additional crime, only that it was reasonably foreseeable. (*Ibid.*) The consequence need not be strongly probable. A possible consequence which might reasonably have been contemplated is enough. (*Ibid.*) It is "not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed" (*ibid.*) given the "great potential for escalating violence during gang confrontations."

(*People v. Montes* (1999) 74 Cal.App.4th 1050, 1056.) It is also not necessary that the victim be a member of a rival gang. (*People v. Medina, supra*, at pp. 921, 923 [in which gangs of victim and defendant were not rivals].) No particular factors are dispositive; the court must look at the totality of the circumstances. (*Id.* at p. 922.)

Here, substantial evidence supported a conclusion that Mendoza participated in a gang-related attack on Ramirez and should reasonably have contemplated that it would escalate into a shooting. There was evidence that Mendoza called out "La Puente" before hitting Ramirez, that La Puente uses violence, including shooting, to increase its reputation, that Mendoza pursued the victim into the store and sought to escalate the confrontation by drawing him back outside, and that the escalating danger was perceptible by Ramirez, who urged the store clerks to call police. A rational jury could conclude that Mendoza would have or should have known that escalation of the confrontation to a deadly level was reasonably foreseeable.

Calculation of Arceo's Sentence

As respondent concedes, the trial court erroneously applied the principal term/subordinate term methodology set forth in section 1170.1. The court erroneously selected an indeterminate term as the "principal" term, based on its determination that the attempted murder was the gravamen of the case. This resulted in an incorrect and unauthorized sentence and remand is required.

Arceo was convicted of a crime punishable by an indeterminate term (attempted premeditated murder) and two crimes punishable by determinate terms (shooting at an occupied building and possession of marijuana for sale). Sentencing under the indeterminate sentencing scheme (§ 190) and the determinate sentencing scheme (§§ 1170 & 1170.1) must be performed separately. (*People v. Neely* (2009) 176 Cal.App.4th 787.) The court must independently calculate the total indeterminate sentence and the total determinate sentence before combining them. (*Id.* at p. 797.)

To calculate the total indeterminate sentence, the court simply imposes the statutory term of imprisonment for each crime punishable by an indeterminate term, plus any enhancements. Here, the court correctly performed the indeterminate sentence calculation. It selected a life term for attempted premeditated murder, plus a consecutive term of 25 years to life for the firearm enhancement.

To calculate the total determinate sentence, the court should make no reference to the indeterminate terms. (*People v. Neely, supra*, 176 Cal.App.4th at p. 798.) Here, the court erred when it selected an indeterminate term as the principal term for purposes of calculating the total determinate sentence. To correctly calculate the total determinate term, the court should first select a base term for each crime that is punishable by a determinate sentence. Here, the court could select either three, five or seven years for the shooting and could select either one and one-third, two or three years for the marijuana possession. Next, the court adds to each base term any applicable enhancements specific to that crime. Then, the court should designate the crime for which it has selected the greatest base term (including specific enhancements) as the principal term. The principal term will necessarily be a determinate term. Selection of the principal term is pure arithmetic; the gravamen of the case is not part of the equation. Finally, the court should calculate the total determinate sentence by adding the principal term, one-third the middle term for any crimes that are ordered to run consecutively to the principal term (§ 1170.1, subd. (a)), and the full base term for any crimes that are ordered to run concurrently to the principal term.

Once the total determinate sentence is calculated, the court combines the total indeterminate and total determinate sentences. It may impose the indeterminate term consecutive to the total determinate term (§ 1168), but it may not impose it consecutive to part of the total determinate term and concurrent to another part of the total determinate sentence as it did here.

Because the court misunderstood the sentencing methodology, it must be given the opportunity to revise all of its discretionary choices for the determinate crimes on remand. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258.)

Presentence Conduct Credits

Respondent also concedes that the court erred when it denied Arceo and Mendoza presentence conduct credits. They were entitled to credit for 15 percent of the actual period of presentence confinement pursuant to section 2933.1, subdivision (c). In his reply brief, Arceo notifies the court that the error was corrected by the trial court on August 31, 2009.

DISPOSITION

We vacate the sentences, and remand for resentencing as to the crimes that are punishable by determinate terms. (§ 246 & Health & Saf. Code, § 11359.) We direct the trial court to grant presentence custody credits to both appellants, if it has not done so already, and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Tia Fisher, Judge
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